IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5438 OF 2007

Hemlata Eknath Waje .. Petitioner

V/s

State of Maharashtra & Ors. .. Respondents

Mr.V.A. Thorat, Senior Advocate with Mrs.Neeta Karnik for the petitioner.

Mr.R.D. Rane, Government Pleader with Mr.C.R. Sonawane, A.G.P. for respondent no.1.

Mr.R.S. Apte for respondent no.2.

Mr.C.J. Sawant, Senior Advocate i/b Ms.Snehal Yadav for respondent no.3.

Mr.V.M. Thorat for the intervener with the leave of the Court.

CORAM : S.B. MHASE &
D.G. KARNIK, JJ.

DATE : 4TH SEPTEMBER 2007

ORAL JUDGMENT: (Per D.G. Karnik, J.)

1. Rule, returnable forthwith. Learned counsel for the respondents waive service.

2. By consent, called for hearing. Heard the counsel.

3. By this petition, the petitioner seeks a

mandamus or a direction to the respondents, i.e. State of Maharashtra and the Municipal Corporation of Thane, to provide a separate and independent reservation of seat for the councillors belonging to the scheduled tribe/s in the Municipal School Board of the Thane Municipal Corporation (the respondent no.2) to be formed under section 3 of the Bombay Primary Education Act, 1947.

4. The petitioner belongs to a scheduled tribe and was elected as a councillor of the respondent no.2 Municipal Corporation in a seat reserved for scheduled tribes. Section 3 of the Bombay Primary Education Act, 1947 (for short "the Act") contemplates formation of a municipal school board for each municipality. Section 4 of the Act says that the municipal school board shall consist of members not less than 12 and not more than 16. It also provides for appointment of members of the school board. Some members are nominated by the school board and some are elected from amongst the councillors of the municipality. Sub-section (6) of section 4 of the Act is relevant and reads thus:-

> "Section 4.
>
> (1) .....
>
> (2) .....

(3) .....

(4) .....

(5) .....

(6) Of the members elected by the authorised municipality such number not exceeding two as may be prescribed shall be from amongst the Scheduled Castes and the Scheduled Tribes."

Sub-section (6) of section 4 enables the State Government to prescribe that not more than two seats shall be filled by election from amongst the councillors belonging to scheduled castes and scheduled tribes. A combined reservation of not more than two seats of a municipal school board can be prescribed by the State Government for the councillors belonging to scheduled castes and scheduled tribes. According to the petitioners, for last several years only members of scheduled castes are being elected to the two posts of members of the municipal school board reserved for scheduled castes and scheduled tribes causing injustice to the persons belonging to the scheduled tribes. Mr.Thorat, learned Senior Advocate appearing for the petitioner, submitted that this is impermissible, unconstitutional and contrary to the spirit of Article 243T of the Constitution of India. He therefore prayed that a mandamus be issued to the respondents directing

filling up of the said posts by rotation or reserve at least one post to a councillor belonging to a scheduled tribe. Mr.Sawant, learned counsel appearing for the Mayor/Election Officer, Thane Municipal Corporation (Respondent No.3) supported the contention of the petitioner.

5. The respondents no.1 and 2 strongly opposed the petition and submitted that there cannot be a reservation within a reservation. The State Government is authorised to reserve not exceeding two seats for the councillors belonging to scheduled castes and scheduled tribes. Power to reserve two seats has been exercised by the State Government by making a general reservation in favour of the councillors belonging to scheduled castes and scheduled tribes without any sub-classification. Issuance of any direction to the State Government or to the Municipal Corporation to reserve one out of the said two seats to the members of the scheduled tribes would amount to a legislation and/or giving a direction to the State Government to legislate or perform and exercise statutory power in a particular way. In any event, submitted counsel, that if a discretion has been conferred by a statute on the State Government to reserve two seats for members of the scheduled castes and scheduled tribes and the State

Government has exercised the said discretion in reserving the two seats for the councillors belonging to the scheduled castes and scheduled tribes, no further direction can be issued of making sub-reservation in favour of members of scheduled tribes. Mr.V.M. Thorat, learned counsel appearing as intervener, supports this submission.

6. Article 243T of the Constitution of India provides that seats shall be reserved for scheduled castes and scheduled tribes in every Municipality and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Municipality as the population of the scheduled castes or of the scheduled tribes in the Municipal area bears to the total population of that area and seats may be allotted by rotation to different constituencies in a Municipality. Article 243T applies in respect of elections to the posts of councillors in a Municipality. It does not apply for elections of committees, sub-committees, boards, sub-boards or other bodies to be constituted by a Municipal Council from amongst the councillors. Members of the municipal school board are not directly elected as the councillors are, but a few members of the school board are nominated by the

Government and the remaining members are elected by the councillors from amongst the members. Article 243T of the Constitution does not apply for election of members of the school board or for that matter election of the members of any committee or sub-committee or body to be elected by the councillors from amongst themselves. In our opinion, therefore, Article 243T of the Constitution does not apply to the facts of the present case.

7. Counsel for the petitioner, however, submitted that the principle enunciated in Article 243T of the Constitution should be applied even for election to all committees or sub-committees of the councillors. Article 243T was added by way of an amendment to the Constitution with a view to make reservation of seats in favour of persons belonging to scheduled castes and scheduled tribes. Such reservation, though restricted only for the seats in the Municipality, that is to say for the councillors in a Municipality the spirit thereof must also apply for indirect elections to all committees or sub-committees or other bodies, to be formed from amongst the councillors. We are unable to agree. Plain reading of sub-section (6) of section 4 of the Act leaves no doubt that it authorises the State Government to prescribe that not more than two members of a school board shall be from amongst the members of the scheduled

castes and scheduled tribes. No further sub-classification is contemplated under sub-section (6) of section 4 of the Act. Prescription of reservation of not more than 2 seats of members belonging to the scheduled castes and scheduled tribes is made statutorily. It is well settled that the court cannot legislate nor can issue any direction to legislate in any particular way nor can it provide sub-reservation in respect of any class or sub-class.

8. In the circumstances, we find no merit in the petition, which is hereby rejected.

(D.G. KARNIK, J.) (S.B. MHASE, J.)